

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AMAZON.COM SERVICES LLC, a Delaware  
limited liability company,

Plaintiff,

v.

JOEL SACKS, in his official capacity as the  
Director of the Department of Labor & Industries of  
the State of Washington, and the DEPARTMENT  
OF LABOR & INDUSTRIES of the State of  
Washington,

Defendants.

No. 2:22-cv-01404-JCC

REPLY IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

**NOTE ON MOTIONS CALENDAR:  
January 6, 2023**

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1 **I. INTRODUCTION**

2 None of the arguments advanced by L&I in opposition to Amazon's Motion for Summary  
3 Judgment creates a genuine dispute of material fact. L&I merely recites the same flawed  
4 arguments it advanced in its Motion to Dismiss [Dkt. 10]. Because WISHA's pre-hearing  
5 abatement requirement and its perfunctory stay procedures violate the Due Process Clause of the  
6 Fourteenth Amendment by permanently depriving employers of substantial property (here, tens of  
7 millions of dollars in abatement costs) before giving them a meaningful opportunity to challenge  
8 the government's claims, the Court should grant Amazon's Motion for Summary Judgment and  
9 issue appropriate declaratory relief.

10 **II. LEGAL ARGUMENT**

11 **A. Amazon Has Standing to Challenge WISHA's Abatement Procedures.**

12 **1. Plaintiffs Need Not Exhaust Unconstitutional Processes.**

13 According to L&I, for Amazon to have standing to challenge WISHA's pre-hearing  
14 abatement obligation and stay regime, Amazon must first exhaust the entire unconstitutional  
15 process and receive an adverse decision on the merits of its stay request. *See* Dkt. 19 at 9. L&I is  
16 wrong.

17 "[T]he general rule [is] that federal courts cannot require exhaustion under § 1983." *Patsy*  
18 *v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 512 (1982); *see also Knick v. Twp. of Scott*, 139  
19 S. Ct. 2162, 2167 (2019). One reason for this rule is that administrative tribunals, like the Board,  
20 lack authority to address due process challenges to the regimes they administer. *See Yakima Cnty.*  
21 *Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wn.2d 255, 257 (1975) ("An administrative tribunal  
22 is without authority to determine the constitutionality of a statute."); *In Re: Duling Enters., LLC*  
23 *DBA Stuffys II Rest.*, 2022 WL 3650260, at \*5 (Wash. Bd. Ind. Ins. App. July 20, 2022) ("[t]he  
24 Board does not have authority to address constitutional issues"). There are thus no efficiencies to  
25 be gained by requiring a party challenging the constitutionality of an administrative regime to  
26 submit to the same unconstitutional procedures it seeks to invalidate as violating the Due Process  
27 Clause. *See Mohamed v. Holder*, 995 F. Supp. 2d 520, 533 (E.D. Va. 2014) ("administrative

remedies are almost always inadequate to address procedural due process challenges to those remedies”); *Jackson v. St. Charles Par. Hous. Auth. Bd. of Comm’rs*, 441 F. Supp. 3d 341, 353 (E.D. La. 2020) (“it is well-established that § 1983 claims do not require exhaustion of state administrative or judicial remedies.”). Here, Amazon’s Complaint challenges the constitutionality of WISHA’s entire stay of abatement process, including the Board’s policy of reflexively denying stay requests because an employer provided employees with late notice of the appeal. *See* Dkt. 1 at 8, ¶ 29. Because the Board lacks jurisdiction to decide constitutional issues, *see* Dkt. 13-1 at 236, 248-49, exhaustion of state administrative procedures is not required, and Amazon has standing. Dkt. 28 at 10-13.<sup>1</sup>

## 2. L&I’s Prejudice Argument Does Not Defeat Standing.

L&I argues that Amazon cannot show it was prejudiced by WISHA’s stay of abatement procedures because Amazon’s late compliance with the employee notice provision breaks the chain of causation. Dkt. 19 at 10.<sup>2</sup> But L&I ignores the fact that Amazon challenges not just the perfunctory stay procedures but also the rule requiring automatic denial of a stay if an employer

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<sup>1</sup> The few cases upon which L&I relies are inapposite. *See, e.g.*, Dkt. 28 at 13 (distinguishing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013)). In *Swanson v. Worley*, 490 F.3d 894, 896-97 (11th Cir. 2007), a plaintiff had standing to challenge a voter signature requirement because the injury—omission from a general ballot—was traceable to non-compliance with that provision. *Id.* at 903 n.10. Here, Amazon challenged the entire stay regime, not just the Board’s application of WAC 263-12-059(4). But if that provision were all Amazon had challenged, then, as in *Swanson*, Amazon would still have standing because that provision contributed to the denial of a meaningful opportunity to challenge L&I’s allegations before being permanently deprived of property. In *Jones v. Cavazos*, 889 F.2d 1043, 1047 (11th Cir. 1989), the court found that where the plaintiff admitted her only defense was the statute of limitations, the plaintiff’s injury—a tax refund offset to repay student loans—was not traceable to the government’s failure to provide a notice listing all possible defenses, nor was it traceable to her failure to timely request an administrative hearing. *YCS Investments v. United States Fish and Wildlife Service*, 833 F. App’x 712 (9th Cir. 2021), is a short, unpublished decision that also has nothing to do with the issues presented here. In *YCS*, the court held that the plaintiff lacked standing to challenge an Incidental Take Permit for the bay checkerspot butterfly because nothing prevented YCS from conserving the butterfly on its own land. *Id.* at 713. *D.L. v. Unified School District No. 497*, 596 F.3d 768, 775 (10th Cir. 2010), and *Pucket v. Hot Springs School District No. 23-2*, 526 F.3d 1151, 1162-63 (8th Cir. 2008), are also distinguishable because in those cases, the plaintiffs never asked the government to grant them the relief they sought. Conversely, Amazon sought a stay of abatement, cured the employee notice defect, and then sought reconsideration. And in *Taylor v. FDIC*, 132 F.3d 753, 766-67 (D.C. Cir. 1997), the court held that the plaintiffs lacked standing to assert a claim for reinstatement because they quit voluntarily to pursue employment elsewhere. The facts of *Taylor* have nothing to do with this case.

<sup>2</sup> L&I’s related argument that Amazon’s injury is “self-inflicted” lacks merit for the additional reasons already set out in Amazon’s Opposition to L&I’s Motion to Dismiss. *See* Dkt. 28 at 11-13.

1 posts notice late (WAC 263-12-059(4)). Dkt. 1 at 8, ¶ 29. Furthermore, L&I concedes that the  
2 Board's application of the rule affected the outcome, prejudicing Amazon. *See* Dkt. 10 at 13  
3 (admitting that if Amazon had posted the employee notice by April 18, then "the Board would  
4 have considered the merits ..., and Amazon could have received a stay").

5 The cases L&I cites are inapposite. *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 833-34  
6 (9th Cir. 1996), involved a § 1983 suit against a county for negligent supervision and hiring after  
7 an officer attempted to rob the plaintiffs on his day off. Because the county could not have foreseen  
8 that the officer would "become a free-lance criminal," his private conduct broke the chain of  
9 causation (i.e., he was not acting under color of state law), and the court granted judgment as a  
10 matter of law after trial. *Id.* at 837. Nothing remotely analogous happened here. *Vilchez v. Holder*,  
11 682 F.3d 1195 (9th Cir. 2012), also provides no assistance to L&I. The plaintiff there alleged that  
12 his due process rights were violated in part because a video conference compromised his credibility  
13 in a removal proceeding. *Id.* at 1199-1200. But because the immigration judge did not make an  
14 adverse credibility determination, the court found that the plaintiff could not show that the hearing  
15 outcome would have been any different had it been conducted via live testimony. *Id.* Unlike  
16 Amazon here, the plaintiff in *Vilchez* could not show that he was prejudiced by the procedures he  
17 challenged.

18 **B. L&I's Attack on Amazon's As-Applied Challenge Lacks Merit.**

19 **1. L&I's Arguments Do Not Defeat Amazon's Showing of a Sufficient**  
20 **Property Interest under the First *Mathews* Factor.**

21 The first *Mathews* factor looks to whether a substantial property interest is at stake.  
22 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Again, focusing myopically on the employee  
23 notice requirement, L&I attacks Amazon's property interest by arguing that Amazon failed to  
24 allege any costs associated with posting employee notice under WAC 263-12-059(2). Dkt. 19  
25 at 11. But the relevant costs are not posting costs; they are the millions of dollars Amazon must  
26 spend to comply with L&I's abatement requirements because WISHA's stay of abatement  
27 procedures deprived it of a meaningful opportunity to contest the prehearing abatement  
obligations. *See* Dkt. 1 at 11-12, ¶¶ 40-43; 15-16, ¶¶ 52-54; Dkt. 12 at 12-14; Dkt. 16 at 6-7. L&I



1 concedes that these “costs can be a property interest” for purposes of a due process claim. Dkt. 19  
2 at 11.

3 L&I next claims that Amazon’s abatement costs are not “substantial” for two reasons.  
4 First, L&I’s witnesses speculate that the amount is less than \$25 million but, tellingly, do not offer  
5 their own estimate nor do they deny that abatement might cost upwards of tens of millions of  
6 dollars. *See* Dkt. 19 at 23 n. 8. Further, that argument does not create a dispute of material fact.  
7 L&I has already conceded that Amazon faces a permanent deprivation of protected property,  
8 whether that is \$25 million or half or a third of that.

9 Second, L&I complains that Amazon has not alleged that the millions of dollars in costs  
10 are so weighty as to impose any “economic hardship” or “jeopardize [its] ... long-term profitability  
11 and competitiveness.” Dkt. 19 at 12, 21-22, 23-24. But as in its Motion to Dismiss, L&I conflates  
12 what constitutes a substantial property interest for purposes of the Due Process Clause with what  
13 the government must show to prove that feasible means of abatement exist. *See* Dkt. 28 at 16.  
14 These are separate, unrelated inquiries. If it were otherwise, then larger companies better able to  
15 absorb costs of abatement would be afforded less due process than smaller ones even though the  
16 protected property interest is the same. That is not the law. *See Bd. of Regents of State Colls. v.*  
17 *Roth*, 408 U.S. 564, 570-71 (1972) (“to determine whether due process requirements apply...,  
18 [courts] look not to the ‘weight’ but to the nature of the interest at stake.”). *See also* Dkt. 28 at 16.

19 L&I’s argument that financial costs constitute “minimal” property interests also fails. Dkt.  
20 19 at 22-24. Although courts sometimes find that financial deprivations are less troubling than  
21 others, it is often because the money is taken temporarily or can be recouped after a reasonably  
22 prompt post-deprivation hearing. *See Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 30 (D.D.C.  
23 2009), *aff’d*, 610 F.3d 110 (D.C. Cir. 2010) (citing *City of Los Angeles v. David*, 538 U.S. 715, 717  
24 (2003)). Here it is undisputed that even if Amazon ultimately prevails at the merits hearing,  
25 Amazon will be unable to recoup the tens of millions of dollars it will have spent to implement  
26 L&I’s abatement measures. *See* Dkt. 19 at 22 (prehearing abatement costs are “nonrefundable.”)

27 L&I’s final argument, that it is “willing to accept Amazon’s full implementation of the

1 company's own ergonomic plan" and that "[n]othing in L&I's abatement suggestions require  
2 Amazon to redesign its warehouse," is disingenuous and disregards the evidence. Dkt. 19 at 7,  
3 23. Amazon's ergonomic plan outlines a process for identifying, assessing, and implementing  
4 controls for abating ergonomic hazards. See Dkt. 13-1 at 117-160. Amazon implemented its  
5 ergonomic plan at BFI4 before L&I's inspection and, consistent with that plan, adopted various  
6 engineering and administrative controls (e.g., Destuff-IT and Restuff-IT conveyors, Safety School  
7 Training, WorkingWell Program, etc.). See Dkt. 13-1 at 110-115 & 163. L&I simply refuses to  
8 accept Amazon's implementation as sufficient abatement. See Dkt. 28 at 17. According to L&I's  
9 experts, additional "forklifts, motorized pallet jacks, or manual pulled Go Carts" should also be  
10 used; the destuffers Amazon installed need to be modified; lifts, if not "replaced with slides,"  
11 should have "height adjustable bottom[s];" and "vacuum lifts" should be used "to move heavy  
12 objects." Dkt. 13-1 at 271-72. L&I's experts also testified that the "[p]rocurement,  
13 implementation and installation of [these] control measures" along with "[t]esting, modification,  
14 and acceptance" of the same is "*required under the citation.*" *Id.* at 274 (emphasis added). It is  
15 impossible to read this testimony and conclude that L&I's citation does not require Amazon to  
16 implement additional costly engineering controls. Thus, when L&I says it will "accept"  
17 implementation of Amazon's ergonomic plan, what L&I really means is that Amazon must draw  
18 the same conclusions as L&I and adopt L&I's abatement measures.

19 **2. L&I's Arguments Do Not Defeat Amazon's Showing of a Risk of**  
20 **Erroneous Deprivation under the Second *Mathews* Factor.**

21 **a. Denying a Stay Request Due to Late Employee Notice**  
22 **Increases the Risks of Error.**

23 L&I argues that the automatic denial of an employer's stay request when an employer  
24 provides late employee notice poses "no risk" of an erroneous property deprivation. Dkt. 19 at 15-  
25 17. But when the Board denies a stay for that reason, it gives no consideration to the complexity  
26 of the underlying citation, the merits of the stay request, or the costs of implementing unnecessary  
27 abatement measures required by the citation. The Board's policy of refusing to consider the merits  
of stay requests thus increases the risk in those cases that employers will suffer erroneous property

1 deprivations in the form of unnecessary abatement orders.

2 **b. The Supposed Safeguards Are Inadequate.**

3 L&I contends that the Board's policy creates no risk of erroneous deprivations because  
4 employers can seek equitable tolling, move for reconsideration, or seek a writ of certiorari under  
5 RCW 7.16.040. *See* Dkt. 19 at 13-14, 16, 17. These arguments also fail. L&I admitted that  
6 equitable tolling is not available in cases like this. Dkt. 10 at 18 n.3. And none of the cited  
7 procedures provides constitutionally adequate protections against an erroneous property  
8 deprivation. *See* Dkt. 28 at 18-22.

9 Motions for reconsideration offer no more assistance than equitable tolling, as this case  
10 demonstrates. Amazon immediately cured the notice error on June 6, the next business day after  
11 it received the Board's denial of its stay request. Dkt. 28 at 12 n. 2. The Board nonetheless denied  
12 Amazon's motion for reconsideration on August 8, Dkt. 13-1 at 313-15, even though Amazon's  
13 employees received 63 days' notice that Amazon had appealed the Citation and sought a stay of  
14 its abatement obligations (substantially more notice than the 46 days they would have received  
15 had Amazon posted employee notice on April 18, when it was originally due).

16 Writs of certiorari under RCW 7.16.040 are also unavailing. As Amazon has previously  
17 explained, a writ of certiorari to review a Board's denial of a stay of abatement request is not  
18 available, as such decisions are administrative rather than adjudicatory in nature. *See* Dkt. 28 at  
19 19-22 (providing analysis and authority). But even if that were otherwise, L&I cites no authority  
20 to support its proposition that the possibility of seeking a writ cures procedural due process  
21 violations. Such a holding would upend decades of cases holding that "where the state feasibly  
22 can provide a predeprivation hearing before taking property, it generally must do so" regardless of  
23 the adequacy of postdeprivation remedies. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).

24 **c. WISHA's Stay Procedures Do Not Comport with Due Process.**

25 To avoid the obvious due process implications of WISHA's compressed timeline and  
26 truncated procedures for seeking a stay, L&I alleges that "the Board can and has extended the  
27 time" for issuing a decision on stay requests, citing to the proceedings in this case and to a different

1 matter involving Alaska Airlines. *See* Dkt. 19 at 5, 20. L&I is incorrect. Although the Board can  
2 grant extensions *to file supporting papers*, and did so here, it must issue a decision on a stay  
3 request within 45 *working days* of posting a notice of appeal. *See* RCW 49.17.140(5)(c); WAC  
4 263-12-059(3)(a). *See also* Dkt. 28 at 28-29. This “strict statutory timeline” cannot be moved,  
5 WAC 263-12-059(5), and L&I provides no evidence to the contrary. In neither the Alaska case  
6 nor this one did the Board extend the time for issuing a decision on a stay request. *See* Dkt. 21-1  
7 at 12, 15.<sup>3</sup> And though it is true that the Board granted Amazon’s request for a two-week extension  
8 to file its supporting materials, such extensions have little ameliorating effect, as L&I still needs  
9 time to respond to an employer’s submission, and the Board needs time to consider the parties’  
10 submissions before the 45 working days expire.

11         Compounding the problems attendant to this compressed timeline is that L&I’s decision to  
12 issue Amazon a “serious, willful” citation under the General Duty Clause and order immediate  
13 abatement of (unproven) ergonomic hazards is a highly fact-specific, complex, and technical  
14 determination that relies heavily on several expert opinions. L&I’s decision is therefore one for  
15 which a high risk of an erroneous property deprivation exists. Dkt. 12 at 19-21; Dkt. 28 at 24-29.  
16 Indeed, L&I has already admitted that one of the abatement measures it identified for Amazon to  
17 implement would serve no purpose at BFI4. *See* Dkt. 13-1 at 260.

18         L&I previously argued in its Motion to Dismiss that WISHA’s abbreviated procedures  
19 comported with due process because the civil rules applied. *See* Dkt. 10 at 24. L&I appears to  
20 have dropped those arguments, apparently conceding, as Amazon argued in its opposition papers,  
21 that traditional tools of discovery (e.g., interrogatories, requests for production, requests for  
22 admission, and subpoenas) are not available in Washington’s stay procedures. Dkt. 28 at 24-30.  
23 Under WISHA’s compressed timeline, employers have almost no opportunity to probe the basis  
24 for the opinions of the government’s experts or develop their own evidence in response.

25 \_\_\_\_\_  
26 <sup>3</sup> In the Alaska case, the Board issued its decision on May 20, 2016, which corresponds to the forty fifth working  
27 day after the Board accepted jurisdiction on March 17, 2016. Dkt. 21-1 at 12, 15. In this case, the Board had until  
June 7, 2022, to issue its decision on Amazon’s stay request, which corresponds to the forty fifth working day after  
the Board accepted jurisdiction on April 4, 2022. Incidentally, the Board issued its decision on May 27, 2022,  
beating the deadline by three days.

1 As explained in Amazon's Motion for Summary Judgment, the Eleventh Circuit in  
2 *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, 1256-58 (11th Cir. 2003) ("TVA"), found  
3 a "patent violation" of due process under circumstances similar to those presented here. As in  
4 TVA, WISHA imposes an expedited schedule while "discovery [is] effectively unavailable." *Id.*  
5 at 1246. Furthermore, employers "[are] not entitled to any compulsory process" and instead have  
6 to rely on "only those documents that the [government] voluntary divulge[s]." *Id.* Thus, even if  
7 live testimony and oral argument are not required, as L&I contends (*see* Dkt. 19 at 18), WISHA  
8 still denies employers a reasonable opportunity to collect evidence in support of stay requests in  
9 violation of the Due Process Clause.

10 L&I ignores TVA entirely, instead emphasizing the possibility of obtaining records through  
11 Public Records Act requests under Chapter 42.56 RCW. *See, e.g.*, Dkt. 19 at 5, 19, 24. But as this  
12 case shows, that process leaves the scope and timing of L&I's production to L&I's discretion.  
13 Amazon submitted its request on March 28, and it took L&I until April 18 to provide some but not  
14 all of the data and information requested. Dkt. 13 at 3-4. This left Amazon only two weeks to  
15 review L&I's production, assess whether it was complete (it was not), identify the data and  
16 information it believed was still missing, and prepare its own expert reports (there was no time or  
17 opportunity to probe L&I's experts' conclusions in a deposition or cross-examination). Although  
18 Amazon was able to scramble to submit expert reports based on the incomplete information  
19 available to it in the limited time available, that does not mean the process was fair or that it  
20 comported with minimum due process requirements. Two weeks was insufficient time, given the  
21 complexity of the alleged ergonomic hazards at issue.

### 22 3. L&I's Analysis of the Third *Mathews* Factor Is Also Flawed.

23 The third *Mathews* factor considers the government's interest and the fiscal and  
24 administrative burdens that adopting substitute procedures would entail. 319 U.S. at 335. L&I  
25 invokes the importance of protecting public safety and the government's interest in providing  
26 employees notice of an appeal. *See, e.g.*, Dkt. 19 at 12. These are legitimate government interests,  
27 but they are not the only factors to be weighed, and those interests do not defeat Amazon's claims.

1 *See generally* Dkts. 12 and 28.

2 “[I]t is fundamental that except in emergency situations (and this is not one) due process  
3 requires that when a State seeks to terminate (a protected) interest ... it must afford ‘notice and  
4 opportunity for hearing appropriate to the nature of the case’ before the termination becomes  
5 effective.” *Roth*, 408 U.S. at 576-77 (quoting *Bell v. Burson*, 402 U.S. 535, 542 (1971)); *see also*  
6 *Zinerman*, 494 U.S. at 132. This rule applies even when a government is acting pursuant to its  
7 police powers to protect public health and safety. *Cf. Mansour v. King County*, 131 Wn. App. 255,  
8 260, 272 (2006) (decision that dog had to be euthanized or removed from the county for exhibiting  
9 “vicious propensities” violated due process because the owner could not conduct discovery, issue  
10 subpoenas, or cross-examine experts). And for the reasons Amazon has already explained, the  
11 hearing provided under WISHA’s stay of abatement regimes is not “appropriate to the nature of  
12 the case.” *See, e.g.*, Dkt. 12 at 19-22; 26-28.

13 L&I tries to avoid these settled principles by claiming “prompt action is required to protect  
14 public health safety” and that the government has a compelling interest “in avoiding drawn out  
15 proceedings.” Dkt. 19 at 13, 14. But L&I also says that “Amazon could receive additional time  
16 to comply, with the possibility of over a year to abate.” Dkt. 19 at 7. Saying an employer could  
17 take up to a year to implement abatement measures is inconsistent with L&I’s claim that it needs  
18 to act promptly, and if a year’s delay is acceptable to L&I, then it can wait until after a hearing on  
19 the merits of a citation before imposing the abatement obligations.

20 In any event, even if “prompt action is required,” L&I’s argument still fails. L&I can  
21 proceed under RCW 49.17.130 instead of RCW 49.17.140 when it needs to impose immediate  
22 abatement obligations. Doing so would provide employers more protections against erroneous  
23 property deprivation, including prompt superior court review. L&I disputes this, claiming that  
24 RCW 49.17.130 does not provide additional protections over RCW 49.17.140 because it  
25 authorizes the government to seek a temporary restraining order. Dkt. 19 at 21. But L&I is wrong  
26 again. TROs expire in 14 days (Amazon, by contrast, risks a permanent deprivation of protected  
27 property), and the TRO process contemplated by RCW 49.17.130 leads to preliminary and,

1 ultimately, permanent injunctions under procedures that afford discovery, presentation of  
2 testimony, cross-examination, and oral argument. *See* Wash. Civ. R. 65.

3 L&I's arguments regarding the fiscal and administrative burdens that it contends would  
4 come with different procedures do not tip the balance in L&I's favor. *See* Dkt. 19 at 14, 17-21.  
5 WISHA's stay procedures are an aberration. Every other jurisdiction affords more protections  
6 against erroneous property deprivations than WISHA, proving that governments can protect public  
7 health and safety without trampling on employers' due process rights. *See* Dkt. 12 at 23-24. L&I's  
8 argument that it would not be "practical ... to have different procedures" for ergonomics cases  
9 similarly fails. *See* Dkt. 19 at 21. Because the existing procedures deprive employers of due  
10 process, the government can and must adopt better procedures that provide sufficient protection in  
11 all cases in which L&I requires pre-hearing abatement.

12 **C. L&I's Opposition to Amazon's Facial Challenge Also Fails.**

13 L&I claims that when considering Amazon's facial challenge, "[t]he Court must consider  
14 all employers subject to RCW 49.17.140 and WAC 263-12-059, and all workplace safety cases."  
15 Dkt. 19 at 14. L&I misunderstands how courts analyze facial challenges.

16 Courts routinely recognize that a facial challenge can attack a "subset of applications."  
17 *Mwimanzi v. Wilson*, 590 F. Supp. 3d 231, 247, 252 (D.D.C. 2022) (invalidating a subset of search  
18 warrants as facially unconstitutional under the Fourth Amendment). This stems from the rule that  
19 when assessing facial challenges, courts "consider[] only applications of the statute in which it  
20 actually authorizes or prohibits conduct." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 418  
21 (2015). That is, the "proper focus of the constitutional inquiry is [on] the group for whom the law  
22 is a restriction, not the group for whom the law is irrelevant." *Id.* (citations and quotation marks  
23 omitted).

24 The relevant subset of applications here includes cases in which an employer appeals a  
25 citation under the General Duty Clause ordering immediate abatement of ergonomic hazards and  
26 seeks a stay of those abatement obligations. Dkt. 1 at 16; Dkt. 12 at 17. As Amazon has argued  
27 at length, no set of circumstances exists in which the process for seeking a stay is constitutionally

adequate. *See* Dkt. 12 at 17-24. In response, L&I points to an ergonomic hazard abatement plan at a medical facility that imposed no costs because the facility already owned patient lifts; it just had not yet begun to use them. Dkt. 19 at 11. The problem with this example (and the other examples L&I offers) is that it does not involve the application of the procedures Amazon is challenging in this suit. In L&I's example, there is no indication that the medical center sought but was denied a stay of its abatement obligations. In cases where abatement imposes no cost to the employer, as in L&I's example, it is exceedingly unlikely that the employer would go through the trouble and expense of attempting to litigate the abatement obligation or seek a stay. The situations that L&I posits are "the group for whom the law is irrelevant," *Patel*, 576 U.S. at 418 (citations and quotation marks omitted), and thus do not defeat Amazon's facial challenge.

L&I next offers three examples of cases in which the Board granted a stay as evidence that WISHA's stay of abatement procedures do not deprive employers of a meaningful predeprivation hearing. *See* Dkt. 19 at 18; Dkts. 21-1, 21-2, 21-3. But the fact that the Board sometimes grants stay requests does not render the procedures constitutional. And of the three examples provided, only one—the Alaska Airlines matter—involved ergonomic standards, and that case is irrelevant because the Board granted the stay request because Alaska Airlines was not the employer of affected workers. *See generally* Dkt. 21-1.

**D. L&I's Response to Amazon's Substantive Due Process Challenge Fails.**

Regarding Amazon's substantive due process claim, L&I argues that "it is not arbitrary to require an employer to pay to correct hazards it created." Dkt. 19 at 26. But here L&I has not yet established that any hazard exists: WISHA imposes an unconstitutional presumption that employers violated the law, denies them an opportunity to prove their innocence, requires that they certify under penalty of criminal liability that the alleged hazards exist, and permanently deprives them of substantial property interests (up to \$25 million in this case), before any hearing on the merits of the citation. There is no legitimate government interest served by WISHA's punishment before trial regime. *See* Dkt. 12 at 28-29; Dkt. 28 at 31-32.

L&I argues that it is not unconstitutional to place the burden of proof on a party seeking a



1 stay. Dkt. 19 at 26. But, again, that is not Amazon's argument. It is appropriate to place the  
2 burden of proof on the party that seeks a stay of a district court's order entered after a meaningful  
3 adjudication of the merits of an underlying claim for relief. *See Doe #1 v. Trump*, 957 F.3d 1050  
4 (9th Cir. 2020). But that is not what happens under WISHA's stay of abatement regime. Instead,  
5 WISHA deprives employers of property by compelling them to abate unproven ergonomic hazards  
6 before the government proves a violation exists and before the employer has a meaningful chance  
7 to challenge the citation. And in the abbreviated process that is available, WISHA puts the burden  
8 of proof on the employer and not on the government. This is fundamentally unfair and unsupported  
9 by a legitimate government interest.

10 Nor does a rational basis exist for forcing employers to sign the Employer Certification of  
11 Abatement form, which requires employers to certify under penalty of criminal liability that  
12 hazards exist and that feasible means of abatement exist. Evidence Rule 407 does not protect  
13 employers as L&I claims because that rule expressly allows for the admission of such sworn  
14 statements both for impeachment and to show feasibility of precautionary measures. *See* Dkt. 28  
15 at 27. Requiring full pre-hearing abatement and a signed certification before a hearing forces  
16 employers to cede core defenses and relieves L&I of its burden to prove the elements of its case.  
17 *See* Dkt. 12 at 14; Dkt. 28 at 26-27.

18 In ergonomics cases involving a pre-hearing abatement requirement, WISHA presumes  
19 that employers have violated the law, requires that they incur costs to abate alleged hazards, and  
20 deprives them of any real opportunity to rebut the presumption. As the Supreme Court observed,  
21 "[a] statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to  
22 repel it, violates the due process clause of the Fourteenth Amendment." *W. & A.R.R. v. Henderson*,  
23 279 U.S. 639, 642 (1929). WISHA's stay of abatement procedure does both.

### 24 **III. CONCLUSION**

25 For the foregoing reasons, Amazon respectfully requests that the Court grant Amazon's  
26 Motion for Summary Judgment and issue appropriate declaratory relief.  
27

1 DATED this 6th day of January 2023.

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